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No. 83-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON *and* TAKERU KAMIYAMA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The Center for Judicial Studies, 632 Constitution Ave., N.E., Washington, D.C. 20002, is a tax-exempt, public policy institution founded in 1982 for the purpose of promoting judicial and legal reform. The Director of the Center is Dr. James McClellan. The Center is the only educational and public policy organization in the United States which focuses exclusively on the problem of judicial activism and seeks to confine the power of the federal judiciary within the bounds envisioned for it by the framers of the Constitution and of the Fourteenth Amendment.

The decision of the Court of Appeals in this case would confer on the courts a dangerous power to define the content of religious belief even contrary to the good faith profession of the believers as to what they themselves believe. The Center for Judicial Studies maintains that the religious liberty protected by the First Amendment will be seriously diminished if the principle is established that courts can tell sincere believers what they believe and can define authentically religious activities as secular so as to deprive them of the protections of the Religion Clauses of the First Amendment. The Center, therefore, is interested in this petition for certiorari because it presents an opportunity for a clarification of the extent of judicial power in an important and sensitive area.

In filing this brief, the Center for Judicial Studies does not imply that it agrees with the beliefs of the Unification Church. Nor does it offer any endorsement of Reverend Sun Myung Moon as a religious leader or an individual. Rather, the concern of the Center is exclusively with the constitutional issues involved in this case. In the view of the Center, they involve an unjustified expansion of judicial power and present a significant threat to the liberty of all religious groups.

SUMMARY OF ARGUMENT

In *United States* v. *Ballard*, 322 U.S. 78 (1944), it was established that, although courts may inquire into the good faith with which religious beliefs are held, the First Amend-

ment forbids a judicial inquiry into the truth or falsity of those beliefs. If the theory adopted by the Court of Appeals in this case were to be confirmed as the law, it would obliterate the *Ballard* principle and would invite an oppressive entanglement of government with religion. The taxability of the income to Reverend Moon depended on the ownership of the assets. Did they belong to him or to the Unification Church? But the answer to that question depended on whether they were given to him for religious purposes and whether his use of those assets was in accord with those purposes. The jury, however, was allowed to decide that issue without regard to the Church's own view of its purposes. Moreover, the question of what constitutes the religious purposes and activities of the Church is itself a religious question. If the jury decided that those purposes and activities were not believed by the Church to be religious, then the jury was telling the believers what they believed, despite their own good faith belief to the contrary. Such a result would violate the *Ballard* principle. If, on the other hand, the jury acknowledged that the Church believed those purposes and activities to be part of its religion, but then found instead that they were secular, then the result would involve the sort of excessive entanglement of government with religion that is forbidden by the First Amendment. Indeed, it is fair to construe the Court of Appeals' ruling as authorizing a regulation of religious belief rather than merely of conduct, contrary to the settled principle that the freedom of religious belief is an absolute right.

The trial court should have instructed the jury either to accept the decision of the Church leadership as to the content of its beliefs and purposes or to decide that question according to neutral principles of law. The power conferred upon the jury in this case is not justified by the precedents which allow the courts to distinguish religious from secular activities in some situations.

The assumption by courts of an unguided power to define what is secular and religious, contrary to the good faith belief of the Church in question, will result in a reduction of the religious sphere protected by the First Amendment, through the

progressive definition of more and more activities as secular. This prospect is especially real in light of the now established status of the income tax exemption under Section 501(c)(3) of the Internal Revenue Code as a subsidy.

Review by the Supreme Court of the decision of the Court of Appeals in this case is essential to clarify the legitimacy of judicial inquiry into the content of religious belief and judicial definition of what is secular and what is religious.

ARGUMENT

I. The Jury Was Permitted To Make A Doctrinal Judgment As To The Purposes Of The Unification Church Without Even Taking Into Account The Sincere Beliefs Of The Adherents Of That Church And The Jury Was Given A Blank Check To Decide Which Purposes And Activities Of That Church Were Religious And Which Were Secular.

The decision of the Court of Appeals in this case permits the government to tell the adherents of a religious belief what they believe. It also permits the government to decide, without effective limitation, which beliefs and activities are religious and which are secular, thus opening the door to arbitrary official determinations excluding authentically religious activities from the protections afforded by the preferred status of religious freedom under the First Amendment.

To appreciate the implications of this case for religious freedom, it is important to understand what it does *not* involve. It does not involve any claim of exemption on religious grounds from the generally applicable rules of civil and criminal law. It therefore does not involve the principles established in such cases as *Sherbert* v. *Verner* 374 U.S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). Nor does this case present any claim of religious exemption from generally applicable tax laws. *See United States* v. *Lee*, 455 U.S. 252 (1982). Nor does it involve the issue of whether and under what conditions religious organizations may qualify for exemption from federal taxation. *See*

Christian Echoes National Ministry v. *United States*, 470 F.2d 849 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973); *Bob Jones University* v. *United States*, 103 S.Ct. 2017 (1983).

"The central issue for the jury to decide," said the Court of Appeals, "was whether the Tong Il stock and Chase Manhattan Bank accounts belonged to the Church or to Moon personally." *United States* v. *Moon*, 718 F.2d 1210, 1233 (2d Cir. 1983). Or, as Judge Oakes pointed out in his dissent, "the key issue was whether the funds were given to Moon for his own use or for that of his international church movement, and whether, even though some of the funds were utilized for his own living purposes, the donors intended to permit such use." *Id.* at 1243. The issue, therefore, was whether money was given to Moon for a religious purpose and whether his use of that money was within that religious purpose. The central importance of the determination of religious purpose can be seen from the trial court's charge to the jury:

> If you find that the funds in the Chase accounts were the property of International Unification Church Movement or were held in trust by Moon for the International Unification Church Movement and used *for church purposes* and that the interest on those funds also belonged to the International Unification Church Movement and were used for it, then that interest would not be taxable income to Moon." T6583-84[1] (emphasis added).

By what criteria could the jury properly determine what those "church purposes" were and whether Moon's use of the funds was in accord with those purposes, except in light of the Unification Church's own profession of those purposes? The jury was told that "[y]ou should consider all the evidence in making your determination." T6585. But the charge did not instruct the jury as to how it was to determine the "purposes" of the Church. The prosecution, moreover, objected when defense counsel attempted to elicit testimony as to Reverend Moon's state of mind to show the belief of the Unification

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[1] Citations to the trial transcript will be denoted "T____".

Church's members as to the "relationship between church and business." T5255. The objection was sustained on the ground that Reverend Moon's state of mind on the relation between the Church and business was not "a direct issue in the case at all." T5256-57. The trial court also commented that if defense counsel were to introduce evidence on the subject, "you [would be] opening a door to something you wouldn't care to open the door to." T5257. The prosecutor indicated his desire to counter the introduction of religious defenses by exploring, in front of the jurors, "negative things about the church." T5760. Thus, defense counsel was repeatedly warned by the trial court that efforts to offer religious explanations of various church relationships and practices would "inadvertently open some doors" to the introduction of damaging evidence by the government. T3044; *see* T3042-45, 4818-20, 5257, 5735, 5759-60. The defense was thus deterred from offering more evidence than it did on the beliefs and purposes of the Unification Church due to the prospect that the prosecution would respond by introducing "negative things about the church" in a possibly inflammatory way that would fatally prejudice the defendant's case before the jury. As defense counsel was forced to conclude, "if your Honor's feeling is that my asking [a religion oriented] question opens the door to the kind of thing they are talking about, then I feel precluded from asking the question." T4820.

The trial court did note that one fundamental issue raised by the case was "whether Moon can simultaneously be a business and a religion", T5520, and the court acknowledged that the Church members who gave the funds, in their own view, "thought they were working for a higher cause. They thought they were advancing the Unification Church's movement internationally. But when [the government] say[s] in effect it doesn't matter what they thought they were accomplishing, if he took these monies and spent them on his own businesses and on his own goals he was not doing so as a religious leader and you come back to the same question, can he simultaneously be a businessman and a religion." T5521. The trial court, however, refused defendant's request to charge the jury that, according to the Church's theology, Moon is the embodiment of the faith.

T6119. This belief would not make Reverend Moon's every act religious. Nor would it have dictated the jury's conclusion. But there is no way that the jury could have properly decided whether the assets were given to Moon for religious purposes and whether his use of them was within those purposes, except in light of the Church's own definition of its creed and of Moon's central status therein.

The trial court not only failed to instruct the jury that it was bound to accept the Church's own definition of the content of its beliefs and purposes; it also left the jury entirely free to follow its own unguided judgment in this regard. The jury was permitted "to find that if [Moon] used the Chase funds for his own business investments or personal ends—that is for other than religious purposes—such use would indicate the lack of a trust relationship." 718 F.2d at 1226. The Court of Appeals declared that "in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose." Id. at 1227. But what criteria was the jury supposed to use in making this determination? In a secular light, certain purposes and activities might appear to be merely of a personal or business nature. But in light of the sincerely held tenets of the Church, those purposes and activities could be seen to be religious. The jury was not only not bound by those tenets, it was not required even to take them into account.

The problem is compounded by the charge to the jury that, "It is also your duty to appraise the evidence calmly and objectively and to reach your verdict in this case *without* prejudice or sympathy or *any consideration of* race, *religion* or ethnic origin. I have told you before and I repeat it again, that *the* race, *religion* and ethic origin *of the defendants is of no consequence whatever*. They are on trial in an American court before American jurors under the Constitution of the United States and *considerations of* race or *religion must have no part in your deliberations*." T6538 (emphasis added). While this statement was evidently intended to warn the jurors to be "fair and impartial," T6538, and to avoid religious prejudice, the unqualified command to the jurors to avoid "any consideration

of . . . religion", *id.*, reinforces the conclusion that the jury's decision could have been made, for all we know, according to wholly secular standards of the jury's own devising without even any consideration of the sincerely held position of the Church as to what its own religious beliefs, purposes and activities were.

There are two possibilities: First, and despite the absence of any evidence of insincerity on the part of the Church or its members, the jury could have decided that the Church did not even believe that the purposes and activities in question were religious. If so, the jury was telling the members of the Church *what* they believe, despite their good faith protestations to the contrary. Second, the jury could have decided that, even though the Church did believe that those purposes and activities were religious, they were in fact merely secular. But the question of whether a belief or activity is part of a particular religion is itself a religious question. In either alternative, whether the jury found that the members of the Church did not really believe what they claimed to believe or that what they believed to be religious was not so, the verdict is contrary to the seminal principle of *United States* v. *Ballard*, 322 U.S. 78, 87 (1944). Under that principle, the courts may determine in an appropriate case whether a religious belief is held in good faith, but the First Amendment forbids a judicial inquiry into the truth or falsity of religious beliefs. Moreover, "[t]he articulation of the Supreme Court in foreclosing judicial inquiry into the truth or falsity of religious beliefs is equally applicable to judicial inquiry as to the content of religious beliefs." *Holy Spirit Association* v. *Tax Commission*, 55 N.Y.2d 512, 522, 435 N.E. 2d 662, 450 N.Y.S.2d 292 (1982).

II. The Unguided Decision By The Jury As To The Content Of The Church's Beliefs And As To Whether Its Activities Were Religious Or Secular, Results In An Unconstitutional "Excessive Government Entanglement With Religion."

The determination by the jury that the purposes and activities at issue were secular rather than religious is a clear in-

stance of the "excessive government entanglement with religion," *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970), forbidden by the First Amendment. "[T]he Supreme Court has been especially sensitive to an entanglement which requires the state to distinguish between and thus determine what is religious and what is secular." *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court found such an entanglement in the Rhode Island school aid program because it could require "the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Id.* at 620.

The Court in *Widmar* v. *Vincent*, 454 U.S. 263, 265 (1981), held that a University of Missouri regulation barring the use of facilities by student groups "for purposes of religious worship or religious teaching" violated the Free Speech and Free Exercise clauses. The Court noted that a contrary result "would require the university — and ultimately the courts — to inquire into the significance of words and practices to different religious faiths, and in varying circumstances of the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E.g.*, *Walz* v. *Tax Comm'n* . . ." *Id.* at 269 n.6. The *Widmar* Court further noted that "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' *See Chess* v. *Widmar*, 635 F.2d 1310, 1318 (8th Cir. 1980). Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.' *O'Hair* v. *Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (footnote omitted). . . ." *Id.* at 272 n.11. The Supreme Court exhibited a similar concern in *NLRB*

v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court observed that a construction of the governing statute so as to authorize the National Labor Relations Board's "exercise of jurisdiction over teachers in church-supported schools would implicate the guarantees of the Religion Clauses," *id.* at 507, because, among other reasons, "the schools had responded that their [alleged unfair labor practices] were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators *and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.*" *Id.* at 502 (emphasis added); *see also, Heritage Village Church* v. *State*, 299 N.C. 399, 263 S.E.2d 726, 735-36 (1980).

The principle that should have been applied by the Court of Appeals in the instant case was spelled out by the New York Court of Appeals in its 1982 ruling in *Holy Spirit Association* v. *Tax Commission*, 55 N.Y.2d 512, 435 N.E. 2d 662, 450 N.Y.S.2d 662 (1982). The court held that, in determining the eligibility of the Holy Spirit Association for the Unification of World Christianity [otherwise known as the Unification Church] for real property tax exemption, the taxing authorities were bound to accept the Association's own definition of the content of its religious beliefs. The court spelled out the limited role of the courts in matters of belief:

> When, as here, particular purposes and activities of a religious organization are claimed to be other than religious, the civil authorities may engage in but two inquiries: Does the religious organization assert that the challenged purposes and activities are religious, and is that assertion bona fide? Neither the courts nor the administrative agencies of the State or its subdivisions may go behind the declared content of religious beliefs any more than they may examine into their validity. This principle was firmly established in *Watson* v. *Jones* (13 Wall [80 U.S.] 679, 728) when the Supreme Court declared

> that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

The *Holy Spirit* court criticized the tax authorities and the lower court because "each asserted the right of civil authorities to examine the creed and theology of the [Unification] Church and to factor out what in its or his considered judgment are the peripheral political and economic aspects, in contradistinction to what was acknowledged to be the essentially religious component. Each then took the view that beliefs and activities which could be objectively accurately described by knowledgeable outsiders as 'political' and 'economic' were by that fact precluded from being classified as 'religious.' As stated, it is not the province of civil authorities to indulge in such distillation as to what is to be denominated religious and what political or economic. *It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is. The courts are obliged to accept such characterization of the activities of such bodies, including that of the Church in the case before us, unless it is found to be insincere or sham.*" 55 N.Y.2d at 527-28 (emphasis added).

The Court of Appeals in this case repudiated the approach taken by the *Holy Spirit* court and concluded that "in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose. *Holy Spirit Association* v. *Tax Commission*, 55 N.Y.2d 512, 518 . . . (1982), is inapposite. That case dealt with the inquiry that a court may conduct when determining whether a religious organization is entitled to a real property tax exemption under New York law. The principles there enunciated upon which appellant relies are relevant in that context and do not serve as precedent in a federal criminal tax prosecution." 718 F.2d at 1227.

On the contrary, the "principles . . . enunciated" in the *Holy Spirit* case are basic ones of universal application. They forbid the government to prescribe, whether directly by positive command or indirectly by a process of exclusion, the content of religious belief. It is a special cause for concern that the Court

of Appeals in this case appears to be carving out for federal tax prosecutions a special status liberated from the restrictions of the Religion Clauses.

III. The Entanglement With Religion In This Case Is Not Justified By The Precedents Allowing Courts To Distinguish Religious From Secular Activities In Some Situations.

This case is not governed by the precedents sanctioning in some situations a threshold or otherwise limited inquiry as to whether certain beliefs or activities are religious or secular. Such an inquiry is inescapable in certain cases, for example, where the issue is the eligibility of a group for a subsidy. "In *Board of Education* v. *Allen*, 392 U.S. 236 (1968), . . . the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause." *Mueller* v. *Allen*, 103 S. Ct. 3062, 3071 (1983). And the Court has sustained a program of aid to church-related colleges where "[s]uch inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal. . . ." *Tilton* v. *Richardson*, 403 U.S. 672, 687 (1971).

"There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of '*excessive* entanglement,' itself makes that clear." *Roemer* v. *Board of Public Works of Md.*, 426 U.S. 736, 766 (1976) (emphasis in original). The cases sanctioning a threshold or otherwise limited inquiry as to whether the purposes or activities of a group or its personnel are religious, in deciding, for example, whether a creed is entitled to recognition by prison authorities as a religion (*see Africa* v. *Pennsylvania*, 662 F.2d 1025 (3d Cir. 1982); *see also*, *Malnak* v. *Yogi*, 592 F.2d 197 (3d Cir. 1979), holding that Transcendental Meditation is a "religion" and therefore cannot be taught in public schools) or whether a group is entitled to religious tax exemption (*see, e.g.*, *Christian Echoes National Ministry* v. *United States*, 470 F.2d 849 (10th Cir. 1973)), do not seriously threaten religious freedom.

Such inquiries are inescapable and tolerable in the limited areas where they are allowed. For example, tax exemptions are a legislative subsidy provided as "a matter of grace [that] Congress can, of course, disallow . . . as it chooses"; and the burden is on the taxpayer to establish that it is entitled to the exemption. *Regan* v. *Taxation with Representation*, 103 S.Ct. 1997, 2003 (1983); *Bob Jones University* v. *United States*, 103 S.Ct. 2017 (1983). "Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Regan* v. *Taxation with Representation*, 103 S.Ct. 1997, 2000 (1983). Under the terms of Section 501(c)(3) of the Internal Revenue Code, the courts are mandated, in determining eligibilty for exemption, to distinguish between religious purposes or activities and those which do not qualify, including those which are political or inure to the benefit of any private individual.

Abuse is prevented in such cases by the use of a broad concept of religion and of religious purpose. *See Church of the Chosen People* v. *United States*, 548 F. Supp. 1247, 1252-53 (D. Minn., 1982). The term "religion" must be broadly construed for purposes of the Establishment and Free Exercise clauses. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Abington School District* v. *Schempp*, 374 U.S. 203, 220 (1963). In *United States* v. *Seeger*, 380 U.S. 163, 176 (1965), the Court held that the statutory term, "religious training and belief," includes "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ." The task of the courts, in the view of the *Seeger* Court, "is to decide whether the beliefs proposed by a registrant are sincerely held and whether they are, *in his own scheme of things*, religious." 380 U.S. *Id.* at 185 (emphasis added). And in *Welsh* v. *United States*, 398 U.S. 333, 339 (1970), the Court

declared that "the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life." The Court said that this definition would include purely moral or ethical beliefs "held with the strength of traditional religious convictions," *id.* at 340, but it would not include beliefs which do "not rest at all upon moral, ethical, or religious principle but instead [rest] solely upon considerations of policy, pragmatism, or expediency." *Id.* at 342-43. While the Court has not laid down a firm definition of "religion," these cases establish that the term is broadly construed. Of course, in this case there is no dispute about the fact that the International Unification Church Movement is a religion. Nor is there any doubt that the purposes and activities at issue are, in the church's "own scheme of things, religious." *See United States* v. *Seeger*, 380 U.S. at, 185. They include investments and other financial transactions, but they are no less religious on that account. "The appellants' ability to make decisions concerning the recruitment, allocation and expenditure of their funds is intimately bound up in their mission of religious education and thus is protected by the free exercise clause of the First Amendment." *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979).

As long as a very broad concept of "religion" is employed, the precedents allowing threshold or otherwise limited inquiries, where inescapably necessary, into the religious or secular character of a belief or activity, involve only a minimal intrusion of government into religion. Indeed, the satisfaction of the very broad criterion of "religion" adopted in such cases as *Seeger* and *Welsh* is an indirect measure of assessing the good faith of a claim that a belief or activity is religious. However, once the minimum requirement for what constitutes a religion is met, the *Ballard* prohibition against judicial inquiry into the truth or falsity of religious belief must apply in all its rigor. *United States* v. *Ballard*, 322 U.S. 78 (1944). The *Ballard* principle works if we accept a minimal threshold criterion for "religion" and thereafter avoid all official determinations as to the content of sincerely held beliefs. Unfortunately, in this

case, the jury was permitted to roam at large with no instructions as to how they were to decide these questions of religious belief and purpose.

IV. The Trial Court Should Have Accepted The Decision Of The Leadership Of The Unification Church As To The Beliefs And Purposes Of That Church Or Should Have Applied Neutral Principles Of Law To Resolve The Question Of The Ownership Of The Assets In Accord With The Desires Of The Members Of The Church, So As To Avoid A Judicial Decision As To The Content Of Religious Belief.

The importance of keeping courts out of the business of deciding doctrinal issues has been repeatedly recognized by the Supreme Court:

> But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. . . . Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role. *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449-50 (1969).

This case is, in a sense, an intra-church property dispute, involving the issue of who owns the Chase accounts and the Tong Il stock: Reverend Moon or the Church? That issue in turn depends upon whether the property was given and used

for religious purposes of the Unification Church. In determining those religious purposes, the court should have deferred to the decision of the Church leadership, *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871), or should have applied neutral principles of law to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members." *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979). In any event, both the *Watson* approach and the neutral principles approach of *Jones* v. *Wolf* are subject to the limitation that the courts must avoid the decision of doctrinal questions:

> In other words, the use of the *Watson* approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious policy. *Maryland and Virginia Eldership* v. *Church of God*, 396 U.S. 367, 370 (1970) (per curiam) (concurring opinion of Justices Brennan, Douglas and Marshall).
>
> The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such a as church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body. *Serbian Orthodox Diocese*, 426 U.S. at 709. (*Jones* v. *Wolf*, 443 U.S. 595, 604 (1979); *see also*, *Korn* v. *Rabbinical Council of California*, — Cal. App. 3d —, 195 Cal. Rptr. 910, 913, 914-15 (1983), holding that "the court lacks jurisdiction" to decide "controversies concerning religious practice and doctrine.")

"*Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), stated that religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government *as well as those of faith and doctrine*,.." *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. at, 721-22 (emphasis added). Unfortunately, instead of deferring to the Unification Church's leadership as to the content of the Church's religious beliefs and purposes, and instead of formulating a neutral principles approach that would avoid the determination of doctrinal questions, the Court of Appeals in this case dismissed the "neutral principles" doctrine as having "no application to the facts of this case," 718 F.2d at 1228, and allowed the jury to make its own determination, pursuant to criteria unknown, as to the content of the Church's beliefs and purposes. If the jury decided as it did on the strength of its own determination of the content of the Unification Church's beliefs, the jury was sitting as an ecclesiastical rather than a civil tribunal in making a doctrinal judgment contrary to the belief of the Church itself. Even if the jury agreed that the Church believed that these purposes and activities were religious and then found that they were not religious but secular, that finding would still create an unconstitutional entanglement of government with religion. In either case, the jury was deciding that the good faith belief of the Church was false, contrary to the prohibition of the *Ballard* case. We have no way of knowing whether and to what extent the jury acted as a doctrinal tribunal, and for that reason, the instructions to the jury, as upheld by the Court of Appeals, were fatally defective. *See Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942); *Terminiello* v. *Chicago*, 337 U.S. 1, 5-6 (1949); *Yates* v. *United States*, 354 U.S. 298, 311 (1957); *Street* v. *New York*, 394 U.S. 576, 585-86 (1969).

V. The Power Given To The Jury To Define The Content Of Religious Beliefs And Purposes Threatens The Destruction Of Religious Liberty Through The Progressive Definition Of More And More Religious Beliefs And Activities As Secular.

The jury in this case was given an open commission to determine the content of the creed of a religious group contrary to the sincerely held convictions of that group. The danger of excessive government entanglement with religion is no less when a court is making the substantive doctrinal judgments that are involved in defining the content of a particular religious faith than when the court is explicitly declaring that a religious tenet is false. In either case, the court is sitting as an ecclesiastical tribunal rather than as a court of civil law. Indeed, the intrusion of government through a determination of the content of a group's religious belief is, in one respect at least, worse than the entanglement from an explicit denial of the truth of a religious belief. A governmental denial of the truth of a religious tenet would not of itself deprive the group of its protected status as a religion. However, a governmental decision that what the group sincerely maintains as part of its creed is actually not even religious but rather secular, could deprive that group, as to the affected activity, of the special protections afforded by the First Amendment to religion. Religious freedom is a fundamental right. It may be limited by government only upon proof of a "compelling state interest." *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). While "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest," *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981), "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972); *see also Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08 (1940). "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States* v. *Lee*, 455 U.S. 252, 257-58 (1982); *see also Bob Jones University* v. *United States*, 103 S.Ct. at 2035. But if an activity is defined as secular, it can

be subjected to the much less demanding standard applicable to non-fundamental rights and activities, that they can be regulated merely if the regulation is "shown to bear some rational relationship to legitimate state purposes." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973).

Through the progressive definition of more and more religious activities as secular and therefore subject to regulation on the same basis as commercial activities, protected religious freedom will be restricted to the closet and the sanctuary. This prospect is especially ominous in light of the recent ruling that tax exemption is a "subsidy" provided by Congress as "a matter of grace" which Congress may grant or withhold as it chooses. *Regan* v. *Taxation with Representation*, 103 S.Ct. at 2000, 2003. "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard* v. *Filburn*, 317 U.S. 111, 131 (1942). Strict scrutiny does not apply to the classifications involved in granting and withholding such tax exemptions, since "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan* v. *Taxation with Representation*, 103 S.Ct. at 2002. If a tax exemption is conditioned on the religious character of an organization's beliefs and activities; if the courts are vested with the sort of unlimited power to judge what is religious and what is secular which was given to the jury in this case; and if a determination that such belief or activity is secular is not itself subject to strict judicial scrutiny, then churches will be vulnerable to a progressive and arbitrary denial of tax exemption which will force them out of the public dialogue and into the closet. This danger of progressive curtailment of eligibility for exemption complements the danger of progressive regulation from the definition of activities as secular so that they will be deprived of the preferred protection afforded to religion by the First Amendment. So if the power given to the jury in this case is upheld, the churches will be in trouble on both counts. They will be subject to both taxation and regulation without effective limitation. The result will be the privatization of religion. "It seems trite but necesary to say that the First Amendment to our Constitution was designed to

avoid these ends by avoiding these beginnings." *Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943).

It is fair, indeed, to describe the unlimited power conferred on the jury by the Court of Appeals decision in this case as a regulation of religious belief rather than of action. This is so because the jury verdict, in effect, told the members of the Unification Church what they believe. It defined the content of the religious purposes and activities of that church contrary to the good faith understanding of the members themselves. The jury made a doctrinal judgment. Its intrusion into the privileged area of religious belief cannot even be justified by a compelling state interest, since the freedom to believe, as distinguished from the freedom to act, is absolute:

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell* v. *Connecticut*, 310 U.S. 296. . . . Government may neither compel affirmation of a repugnant belief . . .; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . .; nor employ the taxing power to inhibit the dissemination of particular religious views . . . *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963) (emphasis in original).

It is fair to recall here the warning by the Supreme Court in *United States* v. *Ballard*, 322 U.S. at 87 that, "[i]f one could be sent to jail because a jury in a hostile environment found those [religious] teachings false, little indeed would be left of religious freedom." There is serious reason for concern, therefore, about the principles declared by the Court of Appeals in this case. That concern, however, is not at all dependent on one's view of the Unification Church or of Reverend Sun Myung Moon. The significance of this case, rather, is that the courts convicted Reverend Moon and affirmed that conviction by disregarding one of the most important protections afforded by the First Amendment against governmental domination of religious groups. It is essential that this case be heard by the Supreme Court and that the erroneous principles employed by the Court of Appeals be rejected.

VI. Conclusion

For the foregoing reasons, *Amicus Curiae* submits that the Petition for Certiorari should be granted in this case.

Respectfully submitted,

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